may be received as to any facts known to the testator which may reasonably be supposed to have influenced him in the disposition of his property, and as to all the surrounding circumstances at the time of making the will. Wigram on Admission of Extrinsic Evidence in Aid of the Interpretation of Wills, p. 11, et seq.; Proposition 5, p. 51. Ibid, p. 57; Smith *v.* Bell, 6 Peters' R. 68, 75; Doe *v.* Martin, Nev. & Mann. 524; Shelton *v.* Shelton, 1 Wash. 53, 56; Kenyon *v.* McRoberts, Ibid. 96, 102; Ellis *v.* Merrimack Bridge, 2 Pick. R. 243; Brainerd *v.* Condry, 16 Conn. R. 1."

MISCELLANY.

Banks and Banking—Purpose and Relation—Remittances—Damages.—The capturing by the German forces of a Russian town has resulted in a lawsuit in the City of New York involving a rather novel point. The plaintiff applied to the defendant bank for the purpose of having it remit to a relative in a town in Russian Poland 500 rubles, and received from it the following receipt: "Received from Mr. I. S. Filker the sum of $217.50 for a remittance through the European postal service of five hundred rubles to Russia," with a memorandum impressed by a rubber stamp, "subject to delay on account of foreign war," and a further memorandum of the name and address of the person to whom the rubles were to be delivered. Owing to the capture of the town in question by the Germans the bank's forwarding agents were unable to deliver the rubles as directed, and returned them to the defendant, to await the further order of the plaintiff. The latter demanded that he be repaid the money originally paid by him, $217.50, which demand the bank refused, and tendered a much smaller sum, being the market value, on the day of the tender, of the 500 rubles.

Davies, J., of the Municipal Court of New York City, sustained the defendant's contention, saying in part:

"The general purpose of a bank is not to act as a merchant, but as an agent for a principal, and that such is the relationship here is evidenced by the agreement, which describes its object to be a 'remittance,' which, in the words of Bouvier, is 'money sent by one merchant to another, either in specie, bill of exchange, draft or otherwise.' Plaintiff, the principal, purchased of defendant, the banking agent, 500 rubles, and as part of the transaction defendant was to endeavor to make delivery of plaintiff's 500 rubles to the designated person. As the agent was unable to perform, his remaining obligation was to return the principal's property, the 500 rubles, to him. This has been tendered, and to my mind that ends the bank's obligation.

"To hold with plaintiff would be to also determine that at the

place of payment, regardless of the market value of rubles, the payment by the bank, or its Russian correspondent, would have to be upon the basis of the purchasing value of rubles for $217.50 in United States money at that time and place. Clearly, this was not the contract, and if the bank could not be called upon to be effected by a gain or loss in the value of rubles, if delivered in Russia, how can it be upon their return to New York? And, if so, at what point did this condition commence?

"Plaintiff dealt in rubles, and he is entitled to his rubles or their equivalent at the time of his demand.

"Such value having been tendered to plaintiff and paid into court, the issue herein is decided in favor of the defendant, and judgment must be entered therefor."

If, as would seem to be the case, there was an actual purchase of the Russian money, or, what is virtually the same thing, a contract with the forwarding agent by which the latter assumed the risk of any fluctuation in the value of the ruble between the time of entering into the contract and the time of the payment of the money in Russia, the court's decision was undoubtedly correct, since the bank's undertaking was conditional on delivery not being prevented by the war. Indeed, under its memorandum as to delay due to the war, it might properly have held the money until such times as the obstruction ceased, and then have made delivery. But if the plaintiff saw fit to demand the return of his money, he was entitled only to the money which he had purchased—Russian money—and not to the United States money which he had paid for it.—National Corporation Reporter.

Dying Declarations—Admissibility in Evidence—Lightner v. State (Ala.), 71 So. 469.—It was laid down that where deceased, shortly before his death, stated that he was dying, his request in connection therewith that a doctor be called could indicate only a hope for relief from suffering, not a hope that his life could be saved, and does not render his declaration inadmissible. The court said in part:

"When the dying declaration of deceased was first introduced by the State no predicate was offered as to his consciousness of and belief in his impending dissolution. But immediately afterward the witness testified that deceased cried out:

'I am dying! I am dying! My coat is by the fence where I fell. Please get the doctor for me. Lamar Lightner has cut my throat' —and that he died in a short while.

It is contended that deceased's request for a doctor showed that he did not despair of life. We think, however, that this declaration, taken in connection with the plainly desperate character of the wound, and the declarant's almost immediate death thereafter was sufficient evidence of his belief that he was then dying; and that the declaration properly went to the jury. The accompanying request for a doctor,

if it stood alone, would be of equivocal import; for, while it may have been prompted by a lingering hope of life, it may just as well have meant no more than a hope that medical skill might ameliorate his sufferings. But only the latter construction is consistent with his cry, 'I am dying.' This particular point was so ruled in Johnson *v.* State (17 Ala. 618), where the declarant asked the physician who was present if he could help her, and he replied that he thought he could; but this did not exclude the declaration. So, also, in McQueen *v.* State (94 Ala. 50, 10 South. 433), the declaration of deceased that he believed he would not live was not overcome by his contemporaneous request of the witness 'to do all you can for me.'

We hold that the declaration was prima facie admissible, and that it was properly admitted under the circumstances shown." See Michie's Encyc. Dig. Va. & W. Va., vol. 4, p. 848.

Eminent Domain—"Taking"—What Constitutes "Taking"—Willink v. United States, 36 Sup. Ct. Rep. 422.—In the principal case, it was laid down that something more than the location of a harbor line across the land of a riparian owner on a navigable and tidal stream is essential in order to amount to a taking of his property and its appropriation to a public use.

The court in the principal case used the following language: "There was no actual taking of any of the claimant's property, nor any invasion or occupation of any of his land. As respects his upland, he was not in anywise excluded from its use, nor was his possession disturbed. Something more than the location of a harbor line across the land was required to take it from him and appropriate it to public use (Yesler *v.* Washington Harbor Line, 146 U. S. 646, 656, 36 L. Ed. 1119, 1122, 13 Sup. Ct. Rep. 190; Prosser *v.* Northern P. R. R., 152 U. S. 59, 65, 38 L. Ed. 352, 356, 14 Sup. Ct. Rep. 528; Philadelphia Co. *v.* Stimson, 223 U. S. 605, 623, 56 L. Ed. 570, 578, 32 Sup. Ct. Rep. 340). No taking resulted from the request that he remove his facilities, for it was neither acceded to nor enforced. And the contract for cutting away a part of the land was also without effect, because there was no attempt at performance. Thus, at best, the asserted taking rested upon the acts of the engineer officer and the district attorney in preventing the claimant from renewing his piling and rebuilding his wharf. But in this no right of his was infringed. The river being navigable and tidal, whatever rights he possessed in the land below the mean high water line were subordinate to the public right of navigation and to the power of Congress to employ all appropriate means to keep the river open and its navigation unobstructed (Gibson *v.* United States, 166 U. S. 269, 721, 41 L. Ed. 996, 998, 17 Sup. Ct. Rep. 578; Scranton *v.* Wheeler, 179 U. S. 141, 163, 45 L. Ed. 126, 137, 21 Sup. Ct. Rep. 48; Philadelphia Co. *v.* Stimson, 223 U. S. 605, 634, 638, 56 L. Ed. 570, 582, 584, 32 Sup. Ct. Rep. 340;

United States *v.* Chandler-Dunbar Water Power Co., 229 U. S. 53, 62, 57 L. Ed. 1063, 1075, 33 Sup. Ct. Rep. 667; Lewis Blue Point Oyster Cultivation Co. *v.* Briggs, 229 U. S. 82, 88, 57 L. Ed. 1083, 1085, 33 Sup. Ct. Rep. 679, Ann. Cas. 1915A, 232; Greenleaf Johnson Lumber Co. *v.* Garrison, 237 U. S. 251, 263, 59 L. Ed. 939, 945, 35 Sup. Ct. Rep. 551). The piling and wharf were below the mean high water line, and so, if navigation was likely to be injuriously affected by their presence, Congress could prevent their renewal without entitling him to compensation therefor. (See cases supra.) By the legislation in force at the time Congress not only authorized the Secretary of War to establish the harbor lines, but made it unlawful to extend any wharf or other works or to make any deposits within the harbor area as so defined, except under such regulations as the secretary might prescribe, and laid upon the district attorney and the officer in charge of the harbor improvements the duty of giving attention to the enforcement of its prohibitive and punitive provisions (chap. 680, § 12, 25 Stat. at L. 400, 425; chap. 907, §§ 11 and 12, 26 Stat. at L. 426, 455, Comp. Stat. 1913, § 9923). When the claimant attempted to renew the piling and rebuild the wharf they were not only below the mean high water line, but within the harbor area as defined under this legislation. Consistently with its prohibitions he could not proceed with the work except under a permissible regulation of the Secretary of War. It is not contended that the work was thus made permissible, and so the conclusion is unavoidable that the claimant was proceeding in violation of the statute and that the engineer officer and the district attorney rightly requested him to desist. Such inconvenience and damage as he sustained resulted not from a taking of his property, but from the lawful exercise of a power to which it had always been subject (Gibson *v.* United States, 166 U. S. 276, 41 L. Ed. 1002, 17 Sup. Ct. Rep. 578; Bedford *v.* United States, 192 U. S. 217, 224, 48 L. Ed. 414, 417, 24 Sup. Ct. Rep. 238)."

Judgments—Judgment against a Dead Person.—It seems pretty thoroughly settled that a judgment for or against a party who is dead at the time of the commencement of the suit, is void. Poufore *v.* Stone, etc., Co. (Minn.), 157 N. W. 648; Loring *v.* Fulger, 7 Gray (Mass.) 505; Crosley *v.* Hutton, 98 Mo. 196, 11 S. W. 613; Lumber Co. *v.* Rhoades, 17 Tex. Civ. App. 665, 4 S. W. 102; Greenstreet *v.* Thornton, 60 Ark. 369, 30 S. W. 347, 27 L. R. A. 735; Manufacturing Co. *v.* Eaton, 81 Mo. App. 657; Windship *v.* Conner, 42 N. H. 341; Bragg *v.* Thompson, 19 S. C. 572; 1 Black on Judgments, § 203; 1 Freeman on Judgments, § 153. Note to Wardrobe *v.* Leonard, 78 Neb. 531, 111 N. W. 134, in 126 Am. St. Rep. 619. Note to Kager *v.* Vickery, 61 Kan. 342, 59 Pac. 628, 49 L. R. A. 153, 78 Am. St. Rep. 318. See Auerbach *v.* Maynard, 26 Minn. 421, 4 N. W. 816.

However, when a court has jurisdiction of the parties and the sub-

ject-matter and the plaintiff or the defendant dies, and after his death the court renders judgment for or against the deceased party, such judgment is not void. In such cases the court having acquired jurisdiction of the parties, possesses the power to proceed to the final disposition of the action; and while the court ought to cease to exercise its jurisdiction over a party at his death, the neglect to do so is an error to be corrected by some proceeding in the action, in which the error occurs and the judgment, if erroneous, is not on that account to be attacked in a collateral action. In other words, the judgment is voidable when properly assailed but not void. Payfore *v.* Stone, etc., Co. (Minn.), 157 N. W. 648. See Hays *v.* Shaw, 20 Minn. 405 (Gil. 355); Stockings *v.* Hanson, 22 Minn. 542. Note to Kager *v.* Vickering, 61 Kan. 342, 59 Pac. 628, 49 L. R. A. 153, 78 Am. St. Rep. 318. Note to Evans *v.* Spurgin, 6 Gratt. (47 Va.) 107, in 52 Am. Dec. 105. Note to Watt *v.* Brookover, 35 W. Va. 323, 13 S. E. 1007, in 29 Am. St. Rep. 811. Note to Wardrobe *v.* Leonard, 78 Neb. 531, 111 N. W. 134, in 126 Am. St. Rep. 619.

This rule meets with some variation in decision with reference to the stage of the proceedings at which the judgment was rendered, the record being silent as to death. Thus in Hamilton *v.* Holcomb, 1 Johns. Cas. 29, it was held that where between imparlance and judgment one of two defendants died, the judgment as to both could be amended on error coram nobis by suggesting his death. In Louisiana it was held that if a served defendant dies before issue joined, judgment against him is a nullity. N. O. S. C. R. Co. *v.* Bosworth, 8 La. Ann. 80; Norton *v.* Jamison, 23 ibid. 102.

Where defendant dies before time to answer, it was said his death cannot put him in default and "a default cannot be taken against a dead man, any more than a summons can be served on a dead body." Borsdorff *v.* Dayton (N. Y.), 17 Abb. Pr. 36. But if the default occurred in defendant's lifetime without knowledge by plaintiff of his death, judgment thereafter will not be avoided. Reid *v.* Holmes, 127 Mass. 326. The error was said to be a mere irregularity, not subjecting the judgment to collateral attack; however, the irregularity might be corrected by writ of error.

If defendant dies after judgment by default and before writ of inquiry is executed, his administrators may take advantage of the fact by plea to a scire facias issued against them. Carter *v.* Carriger, 3 Yerg (Tenn.) 411, 24 Am. Dec. 585.

Under New York statute it is provided that a judgment is not authorized to be entered against a party who dies before a verdict, report or decision is actually rendered against him. This renders judgments in such cases absolutely void. Gerry *v.* Post, 13 How. Pr. 118; Adams *v.* Nellis, 59 How. Pr. 385; Lemon *v.* Smith, 47 N. Y. Supp. 158; Stephens *v.* Humphyes, 73 Hun. 199, 25 N. Y. Supp. 946.

Judgments rendered after death sometimes have relation back. Thus in England if rendered during the term it may have date from

its beginning. Magner *v.* Langmead, 7 T. R. 20. But this relates only to the signing and not actual rendition of the judgment. If the cause is actually heard but decree is not pronounced, it may be, notwithstanding death in the meantime. Hall *v.* Clifton, 2 McChord Eq. 88. So if judgment is entered in the minutes, the record may be signed afterwards. Salter *v.* Neaville, 1 Bradf. 488.

In Flock *v.* Wyatt, 49 Iowa 466, it was ruled that entry of a decree of a date subsequent to death was irregular, but it ought to have been entered as of a prior date.

The only rule at common law was that a judgment rendered against a dead man was in all cases void. Weston *v.* James, 1 Sack. 42; Randall's Case, 2 Mod. 308. The injustice of this rule brought out the fiction of having all judgments bear date from the first day of the term. Broos *v.* Mersereau, 18 Wend. 653; Life Assn. *v.* Fassett, 102 Ill. 315; Claflin *v.* Dunne, 129 Ill. 241, 21 N. E. 834, 16 Am. St. Rep. 263.

If the entry of a judgment is merely delayed until after the death of one of the parties, it may be entered nunc pro tunc as of a date when he was alive, other party then being entitled to a judgment. Powe *v.* McLeod, 76 Ala. 418; Seymour *v.* Fueling Co., 205 Ill. 77, 68 N. E. 716; Richardson *v.* Green, 130 U. S. 104, 43 L. Ed. 872.

If from laches in not calling the court's attention to death before judgment is entered, a moving party to have same set aside may be denied relief. Rogers *v.* McMillan, 6 Colo. App. 14, 39 Pac. 891; Wood *v.* Watson, 107 N. C. 52, 12 S. E. 49, 10 L. R. A. 541; State *v.* Tate, 109 Mo. 265, 18 S. W. 1088, 32 Am. St. Rep. 664.

In Schmelzer *v.* Central Furniture Co., 252 Mo. 12, 158 S. W. 353, there was death pending appeal, but the court adopts the principle stated in 1st Freeman on Judgments, 4th Ed., § 153, and holds that such judgment is voidable only and that it has the force and effect of a valid judgment until it is set aside.

But this principle, that such a judgment is not void, has been held to have no application to a judgment against a dead man after his death has been suggested of record and the action revived against certain parties, "for the reason that after this is done, the action proceeds as if originally brought against the parties against whom it is revived." In such a case the court is without jurisdiction to enter judgment affecting parties not before it. Ratterman *v.* Apperson, 141 Ky. 821, 133 S. W. 1005. And in the case of Chatfield *v.* Jarratt, 108 Ark. 523, 158 S. W. 146, it is held that where a party dies after the rendition but before the entry of the judgment, his death does not affect the time when his judgment could have been appealed from, as it is not essential to the enforcement of a judgment that it should be entered of record and as the decedent's representatives could have moved the court for a nunc pro tunc entry.

Libel and Slander—Injunction against Libel—Wolf v. Harris (Mo.), 184 S. W. 1138.—The general rule is that an injunction will not lie to restrain the utterance of a libel or a slander. The principal case, however, limits practical outgrowths of this general rule in a manner commending itself to the sense of justice, and doing no real violence to constitutional freedom of speech and publication.

Thus the court in that case held that where a party libeled secures a judgment at law against the libeler, which, owing to the latter's insolvency, cannot be collected, further publication of a libel of like import may be enjoined.

The court also laid it down that where a party libeled joins a count at law for damages for the libel with a count for injunction to restrain threatened continuance of the false publication, and alleges and proves either inadequacy of legal remedy by reason of the libeler's insolvency, or the legal necessity of the restraining injunction to avoid a multiplicity of suits, the court, the jury having found the fact of the libel, and itself having found the necessary facts on the equity side of the case, can enjoin continued publication.

The court in arriving at the conclusions just stated used the following language: "It has been so often ruled that in a plain case of slander of the person or slander of title injunction will not lie that reiteration should be unnecessary (Flint *v.* Hutchinson Smoke Burner Co., 110 Mo. loc. cit. 500, 19 S. W. 804, 16 L. R. A. 243, 33 Am. St. Rep. 476; Life Ass'n *v.* Boogher, 3 Mo. App. 173; Thummel *v.* Holden, 149 Mo. loc. cit. 685, 51 S. W. 404; Clothing Co. *v.* Watson, 168 Mo. loc. cit. 148, 67 S. W. 391, 56 L. R. A. 951, 90 Am. St. Rep. 440; sec. 14, art. 2, Const., 1875; Am. Malting Co. *v.* Keitel, 209 Fed. 356, 126 C. C. A. 277). In the case of Flint *v.* Hutchinson, etc., Co. (supra, 110 Mo. at p. 500, 19 S. W. at p. 806, 16 L. R. A. 243, 33 Am. St. Rep. 476), Black, J., speaking for this court, said:

'We live under a written constitution, which declares that the right of a trial by jury shall remain inviolate, and the question of libel or no libel, slander or no slander, is one for a jury to determine. Such was certainly the settled law when the various constitutions of this State were adopted, and it is all important that the right thus guarded should not be disturbed. It goes hand in hand with the liberty of the press and free speech. For unbridled use of the tongue or pen the law furnishes a remedy. In view of these considerations a court of equity has no power to restrain a slander or libel; and it can make no difference whether the words are spoken of a person or his title to property. In either case it is for a jury to first determine the question of slander or libel in an action at law. This, we conclude, is the result of the better cases in this country and in England.'

The facts before us lacking the element of conspiracy obviously distinguish the instant case from the case of Lohse Door Co. *v.*

Fuelle (215 Mo. 421, 114 S. W. 997, 128 Am. St. Rep. 499) and from the case of Shoemaker *v.* South Bend Spark Arrester Co. (135 Ind. 471, 35 N. E. 280, 22 L. R. A. 332). For the former case was bottomed upon the theory of conspiracy, while the latter case dealt not only with a false publication amounting to slander of title, but with threats toward divers and sundry others, and toward all who might buy or use the alleged patent-infringed article. Besides, the ultimate fact had been already ruled in a proper action, to wit, that there was no infringement, and therefore the alleged slanders of title which the court enjoined had beforehand (but in the same action) been found and declared to be false, and therefore, as to title, slanderous.

It is stated in the Flint case (supra) that after an action at law in which there is a verdict finding the statements published to be false plaintiff, on an otherwise proper showing, could have injunction restraining any further publication of that which the jury has found to be actionable libel or slander, and of slanders or libel of a like or similar import. So say we in this case. If plaintiff had gone to a jury with this alleged libel and obtained a judgment, which, owing to the insolvency of defendant, he was unable to collect, further publication of a libel of like or similar import ought to be enjoined. Or, even if plaintiff had joined a count at law for damages for libel with a count for injunction on the theory of a threatened continuance of the false publication, and had alleged and proved either the inadequacy of remedy by reason of the libeler's insolvency, or the legal necessity of the remedy sought in order to avoid a multiplicity of suits, the court nisi, upon a finding by the jury of the libel, and by the court of the said necessary facts on the equity side, could have enjoined continued publication thereof. Since, however, there is in the instant case neither conspiracy nor threats to others, nor a verdict of a jury upon the fact of libel, we are constrained to say that this judgment cannot stand."